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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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ADRIANA AGUILAR, et al.,  
  
Plaintiffs,

v.

07 Civ. 8224 (JGK)

BUREAU OF IMMIGRATION AND  
CUSTOMS ENFORCEMENT DIVISION  
OF THE UNITED STATES OF  
AMERICA DEPARTMENT OF  
HOMELAND SECURITY, et al.,

Order to Show Cause

Defendants.

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New York, N.Y.  
October 22, 2007  
4:55 p.m.

Before:

HON. JOHN G. KOELTL

District Judge

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1 (Case called)

2 THE COURT: Good afternoon all. Please be seated.

3 THE CLERK: Aguilar v. Bureau of Immigration and  
4 Customs Enforcement.

5 THE COURT: This is an order to show cause for  
6 expedited discovery. I don't sign orders to show cause without  
7 calling the parties in. So it is really a scheduling issue  
8 with respect to when the government will be responding to the  
9 order to show cause or expedited discovery. I believe I memo  
10 endorsed the government's letter which says let us respond to  
11 the order to show cause for expedited discovery at the same  
12 time we move to dismiss. What's that date?

13 MR. CARGO: November 16th, your Honor.

14 THE COURT: So the issue is one really of scheduling.  
15 But I'm perfectly happy to listen to the parties. I have some  
16 views, but I'm perfectly happy to listen to the parties.  
17 Someone on behalf of the plaintiffs?

18 MS. GORDON: Good afternoon, your Honor. Donna Gordon  
19 of Dewey & LeBoeuf.

20 Your Honor, we are here today on plaintiff's order to  
21 show cause for expedited discovery. Really what we see is two  
22 issues before the Court. One is what standard should be  
23 applied, and the second is whether or not plaintiffs meet that  
24 standard on their motion for expedited discovery.

25 As your Honor is possibly well aware, previous courts

1 in this district have applied the four-part test similar to the  
2 preliminary injunction analysis set forth in Notaro v. Koch.  
3 More recently courts have moved away from this standard and  
4 applied a good cause standard or a reasonableness standard,  
5 particularly in cases where the expedited discovery is related  
6 to a preliminary injunction motion. I'd cite the Court to  
7 IOSH, 233 F.R.D. --

8 THE COURT: Do those cases deal with expedited  
9 discovery in connection with a motion for a preliminary  
10 injunction that has been filed and in preparation for a hearing  
11 on the preliminary injunction or with efforts to obtain  
12 expedited discovery prior to filing the motion for a  
13 preliminary injunction?

14 MS. GORDON: It is the second, your Honor. Both the  
15 IOSH case and the Standard Investors Charters case both deal  
16 with instances where plaintiffs are seeking expedited discovery  
17 in aid of their forthcoming preliminary injunction motions.

18 THE COURT: Motion or hearing?

19 MS. GORDON: I believe it's both, the motion and the  
20 anticipated hearing.

21 THE COURT: Before they filed any motion for a  
22 preliminary injunction?

23 MS. GORDON: I do believe that's the case, your Honor.

24 THE COURT: OK.

25 MS. GORDON: Based on the decisions made by the courts

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1 in this district, plaintiffs believe that the good cause test  
2 applies. My plan is to address the IOSH standard as the proper  
3 standard for reviewing plaintiffs' instant requests for  
4 expedited discovery. If your Honor thinks it would be helpful,  
5 I am also prepared to address the Notaro standard.

6 THE COURT: You could address both, but I've indicated  
7 where we are is an issue of scheduling. Unless the parties  
8 convince me otherwise, I would tend to get a response to the  
9 order to show cause and then set it down for an argument  
10 perhaps on the order to show cause for expedited discovery.  
11 That's why I always, even on orders to show cause without  
12 restraint, call the parties in. If things can be resolved at  
13 the conference, they are resolved. If they are not, the other  
14 side has an opportunity to respond. It's a motion.

15 But I'm always happy to listen.

16 MS. GORDON: In that vein, your Honor, I think what we  
17 want to bring your Honor's attention to is the fact that on the  
18 third prong of the good cause standard, which is whether the  
19 need for expedited discovery outweighs the prejudice to a  
20 responding party, we believe that the expedited discovery  
21 motion should be granted and that we should not have to wait in  
22 order for plaintiffs to get an extension of 30 days and/or to  
23 submit their cross-motions for a stay or a motion to dismiss.

24 THE COURT: They want to move to dismiss. I'll listen  
25 to what they have to say. But they say that the case ought to

1 be dismissed, in which case there would be no basis for  
2 discovery.

3 MS. GORDON: Right, your Honor, but that's a  
4 hypothetical motion to dismiss. There is no motion currently  
5 before the Court to dismiss. There is no motion to stay.  
6 There is no way for the Court to evaluate the merits of those  
7 motions.

8 Right now we have real harm before your Honor. We  
9 have constitutional deprivations that are taking place every  
10 day. We would submit that those are greatly in favor of  
11 granting expedited discovery to commence immediately as opposed  
12 to engaging in a briefing schedule.

13 THE COURT: Go ahead.

14 MS. GORDON: Instead of going through each of the  
15 interrogatories and how they are reasonable and narrowly  
16 tailored, think what I want to say --

17 THE COURT: The interrogatories appear to go beyond  
18 what are permitted under the local rules with respect to  
19 interrogatories. They ask, for example, for a narrative  
20 description from every person with knowledge of the arrest to  
21 describe what that person's knowledge is.

22 MS. GORDON: Yes, your Honor.

23 THE COURT: That's way beyond what the permissible  
24 limits of interrogatories are. I raise that only because you  
25 said that each of the interrogatories is narrowly drafted.

1 MS. GORDON: Your Honor, when we drafted both the  
2 document requests and the interrogatories, as well as the  
3 individuals whom we thought we would subject to deposition, we  
4 felt that we did narrowly tailor then and did so in the  
5 confines of the Federal Rules of Civil Procedure.

6 THE COURT: The local rules with respect to  
7 interrogatories limit interrogatories at the beginning of the  
8 case to essentially identification of witnesses, documents,  
9 scope of damages, if memory serves me right. This asks to list  
10 every person with knowledge of the arrest and then to describe  
11 what that person's knowledge is.

12 MS. GORDON: I guess we viewed that in the scope of  
13 identifying the individuals.

14 THE COURT: OK. Could I also ask another question.  
15 Both the interrogatories and the document requests seek  
16 information with respect to every person who was arrested. Are  
17 there any privacy issues with respect to detailed information  
18 with respect to the arrest of persons other than the named  
19 plaintiffs in the case whom you are representing and to consent  
20 to disclosure of personal information about them?

21 MS. GORDON: Could I consult with my colleague for one  
22 second, your Honor?

23 THE COURT: Sure.

24 MS. GORDON: Your Honor, we were simply looking to  
25 obtain the names of witnesses who could give us details about

1 the accounts of the various raids. If there is a privacy issue  
2 involved, we were simply looking for names, but we could also  
3 conduct the discovery under seal.

4 THE COURT: There are always questions with respect to  
5 sealing. The initial questions would be the disclosure of  
6 private information with respect to others who are not their  
7 lawyers. I just raise it. As I said, there has been no  
8 response yet to the motion for expedited discovery. You say  
9 that there is a continuing, ongoing constitutional violation  
10 that's occurring every day.

11 MS. GORDON: Correct, your Honor.

12 THE COURT: The last incident that is described in the  
13 papers was September 24th, I think.

14 MS. GORDON: Yes, your Honor. But that doesn't mean  
15 that the raids have stopped. Every day we notice from things  
16 in the public press or from reports across the country that  
17 these raids are occurring and they occur in the same manner.

18 THE COURT: We are dealing here with the New York  
19 area, right?

20 MS. GORDON: Yes, your Honor.

21 THE COURT: With the New York region and what's  
22 happened since September 24th. Presumably you're not  
23 contending that any arrest or detention that's occurred since  
24 September 24th is unconstitutional.

25 MS. GORDON: Yes, your Honor, I think that we would



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1 contend that. What we are contending, your Honor, is that  
2 there is a pattern and practice here, if not a policy, in the  
3 way that ICE conducts its home raids such that they are  
4 violative of the constitutional rights of the individuals. The  
5 government last time we were here conceded that raids are  
6 happening every day.

7 THE COURT: But they certainly didn't concede, and  
8 I'll listen to the government, that there were unconstitutional  
9 raids that are going on every day. There were two separate  
10 incidents, apparently, or two separate groups. One was a group  
11 where the alleged violation was a failure to obtain informed  
12 consent. A separate set where there were apparently  
13 administrative arrest warrants which was separate from efforts  
14 to obtain informed consent.

15 MS. GORDON: Your Honor, what we would contend is that  
16 the raids that are occurring, maybe in all cases, we don't  
17 know -- this is why we need expedited discovery -- we believe  
18 that the pattern and practice amounts to a policy of ICE to  
19 conduct unconstitutional home raids.

20 If that pattern and practice can be confirmed by the  
21 procedures and the policies and training documents of ICE, then  
22 that would essentially raise it to the level where there would  
23 be no discretion, because they would have to follow these  
24 policies and practices and patterns, and every raid they would  
25 be conducting could almost be deemed to be violative of

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1 someone's constitutional home rights.

2 MR. GENNARDO: Your Honor, it is a little bit more  
3 than that.. What we have, and we read this from the complaint,  
4 first of all, an agency that has increased the quotas for  
5 arrests by their agents by almost 800 percent. We have the  
6 inspector general of ICE saying that ICE has not conducted  
7 proper training for its agents, that it works off of old and  
8 outdated information, that it has uncoordinated and sloppy  
9 policies.

10 We have 27 plaintiffs, all of whom said that their  
11 homes have been unconstitutionally raided. We have articles  
12 from all over the country with very similar types of  
13 allegations about the types of home raids that have occurred  
14 all around the country at the hands of ICE.

15 When you start to pull all of that information  
16 together and look at it, there is certainly a lot of smoke  
17 about the policies of ICE and the way that they conduct home  
18 raids. When you have the government conceding that home raids  
19 are happening every day in the lower New York area, you have  
20 some very real issues and some very real concerns that justify  
21 expedited discovery, especially when you compare that to a  
22 hypothetical motion to dismiss that may or may not be made,  
23 that may or may not have merits.

24 We don't know what those arguments are going to be,  
25 yet we have here today very real constitutional harms happening

1 as recently -- we can document as recently as September 27th.  
2 We have the government saying that the raids are happening  
3 every day.

4 I can't tell you that a raid happened today or  
5 yesterday. We don't hear about every single raid. As Mr. Maer  
6 has told your Honor before, our clients and members of the  
7 putative class are very, very reticent, very afraid to come  
8 forward and seek help. They are afraid of the government. The  
9 customs and the background where they come from, it is not  
10 typical for them to come forward and challenge the government  
11 openly.

12 So while we can't tell you that raids happened  
13 yesterday or today or are going to definitively happen  
14 tomorrow, we do have statements by the government that raids  
15 happen every day. We have a lot of information suggesting that  
16 the policy and practice is to conduct those raids in an  
17 unconstitutional manner.

18 THE COURT: It doesn't necessarily follow that because  
19 there is a search, the search is unconstitutional.

20 MR. GENNARDO: That's correct.

21 THE COURT: The fact that there is a statement that  
22 there are searches and that they do occur is different from a  
23 statement that there is a policy, practice, custom of  
24 unconstitutional searches.

25 MR. GENNARDO: But if the policy is to conduct raids

1 in a particular way and that agency is sending its agents out  
2 to conduct raids -- you're right, your Honor, it could be that  
3 they say, go do the unconstitutional raids here on Monday and  
4 do the constitutional ones here on Tuesday. That's a  
5 possibility.

6 But the if the pattern and practice of the government  
7 is to conduct raids in a particular way and we know that they  
8 are conducting raids every day, we know that the raids they  
9 have conducted in the past are unconstitutional, and we know  
10 from the Nassau police commissioner's letter that other raids  
11 are planned for Nassau County sometime in the future, when you  
12 put all that together, you're right, it's possible that they  
13 pick out certain types of raids for unconstitutional behavior  
14 versus other, but we don't know that. It's not a huge leap to  
15 say that if ICE's policy is to act in a certain way and they  
16 conduct raids every day, that they are using their own  
17 policies. That's all we are saying.

18 THE COURT: All right. Defendants?

19 MR. CARGO: Good afternoon, your Honor. Shane Cargo.  
20 I'd like to loop back and discuss briefly the letter request  
21 and then briefly cover the timing basis for the motion, and  
22 Elizabeth Wolstein is going to cover the scope of some of the  
23 actual requests.

24 First, the scheduling matter. The defendants have  
25 made a very reasonable request to consolidate briefing with

1 their anticipated motion to dismiss. The date that we have  
2 proposed, November 16th, is one week before our response to the  
3 complaint would be due. So we would be filing one week earlier  
4 than we are actually required.

5 More importantly, this Court has already recognized  
6 that standing is an important and substantial threshold issue  
7 in this case. In the October 9 decision the Court stated that,  
8 "Plaintiffs have failed to make a sufficient showing of  
9 likelihood of success on the merits of their claim for  
10 equitable relief." Therefore, in the interests of judicial  
11 economy and efficiency and fairness, the Court should  
12 adjudicate the defendants' anticipated motion to dismiss before  
13 permitting expedited discovery.

14 THE COURT: Don't the questions of whether there is a  
15 policy go to the issue of standing? And irrespective of  
16 whether there is standing for equitable relief, the plaintiffs'  
17 case goes forward based on alleged individual constitutional  
18 violations with respect to the individual plaintiffs, right?

19 MR. CARGO: Correct.

20 THE COURT: And the motion to dismiss would not be  
21 directed to that, right?

22 MR. CARGO: Correct. We have no plan to move against  
23 the Bivins aspect.

24 THE COURT: So what would the motion to dismiss be  
25 directed toward?

1 MR. CARGO: The motion to dismiss would seek to  
2 dismiss claim 1 of the amended complaint, which is the claim  
3 that seeks prospective injunctive relief against ICE. It seeks  
4 two things: A declaration that ICE had violated the  
5 plaintiffs' rights in the past. It also seeks some kind of  
6 injunction broadly prohibiting them from violating their  
7 constitutional rights in the future.

8 This motion to dismiss would move against the first  
9 claim. And as we mentioned in the letter, we would also plan  
10 to file a motion to stay discovery with respect to prospective  
11 injunctive relief. The question of whether discovery could  
12 proceed on the Bivins claims I don't believe we have thought  
13 through, but I don't see much of a basis for moving to stay  
14 discovery on the Bivins cases.

15 THE COURT: On the Bivins there will be a lot of  
16 individual discovery as to what all of the circumstances were  
17 for all of the individual searches that occurred with respect  
18 to all of these individual plaintiffs.

19 MR. CARGO: Correct. But the policy and practice is  
20 really irrelevant to that. It will be a fact-specific inquiry  
21 of whether a given named plaintiff gave proper consent to  
22 having the home searched, and that will turn on the facts of  
23 each encounter. It necessarily has to.

24 THE COURT: There are going to be individual  
25 defendants, there are John Doe defendants, now, right?

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1 Wouldn't it make a difference to the individual defendants  
2 whether the individual defendants were acting pursuant to any  
3 policies of ICE that were either reasonable or not reasonable?

4 MR. CARGO: Yes, I imagine that that issue will come  
5 up in connection with qualified immunity defenses.

6 THE COURT: Sure. So all of that discovery is coming  
7 down the road in any event, right? It's sort of hard to  
8 separate out that discovery.

9 MR. CARGO: I don't agree with that. What they are  
10 seeking is information -- documents, testimony -- going far  
11 beyond what happened to each individual plaintiff in the past.  
12 They are casting a very wide net here seeking disclosure of  
13 policies and practices and statistics and all kinds of things.  
14 Ms. Wolstein will speak more about the scope of the request in  
15 a moment. But I think it goes far beyond the type of  
16 discovery --

17 THE COURT: There is an argument that that is true. I  
18 pointed out some issues with respect to some of the discovery  
19 already. But won't some elements of the motion to dismiss  
20 raise questions with respect to whether there was a policy or  
21 practice and what the policy or practice was in terms of  
22 attempting to determine whether the plaintiffs have standing to  
23 attempt to obtain equitable relief?

24 MR. CARGO: The answer to that question, your Honor,  
25 is not necessarily. In the Lyons case the Supreme Court said



1 that the plaintiffs would have to make the remarkable assertion  
2 that the police officers violated the constitutional rights of  
3 every person they encountered. Here I don't believe that they  
4 have made that remarkable assertion.

5 THE COURT: But in Lyons the plaintiffs would have to  
6 say that they were going to place themselves in the position to  
7 be arrested again, and here the plaintiffs say because of our  
8 nationality we are in the position of being subjected again to  
9 a search.

10 One of the issues that is at least in my mind as I  
11 deal with this is whether there are policies, practices, or  
12 customs that apply to the searches at issue for these  
13 plaintiffs that provide them with standing, and, if so,  
14 standing for what?

15 A motion to dismiss asks me to accept as true the  
16 allegations in the complaint and then asks me to dismiss it  
17 based on the broad allegations in the complaint. I'm raising a  
18 question whether that makes sense, particularly when it's  
19 discovery that's going to come along fairly soon down the road  
20 in connection with the Bivins action. And some of this  
21 material one would think would be available under the Freedom  
22 of Information Act.

23 Going beyond that, I had thought that you told me last  
24 time or at least left me with the impression that one of the  
25 problems with gathering together policies, practices, or



1 customs was that it was a Thursday or a Friday and it would be  
2 difficult to get these policies or practices in a day and a  
3 half. We are now weeks down the road.

4       You know, if the parties are not at loggerheads, the  
5 way in which some of this sometimes gets worked out is parties  
6 sit down and they agree. Plainly, there are some issues on the  
7 face of the requests for discovery. I can read discovery  
8 requests myself.

9       There is the possibility of various privileges that  
10 are out there, whether it be privacy or whether there is a law  
11 enforcement privilege with respect to some information, but  
12 with respect to having sufficient information to litigate  
13 whether there is a policy, practice, or custom, what that  
14 policy, practice, or custom is, whether it is constitutional or  
15 not constitutional.

16       Otherwise, a motion to dismiss is directed against the  
17 complaint which says there is an unconstitutional policy that  
18 we have been subjected to which coerces consent. Is there in  
19 fact such a policy? Do I have to accept an allegation in the  
20 complaint that there is such a policy? Were these searches  
21 conducted according to any sort of general policy, practice,  
22 principle? Are there guidelines? Were there policy  
23 statements? All of that presumably is going to come out not  
24 too long in the future. Then you say, wait until we file our  
25 motion to dismiss, then we are going to move to stay discovery

1 and we are going to respond to the request for expedited  
2 discovery.

3 One would have thought that a more reasonable general  
4 approach to this would be here are the general policies,  
5 practices, here are the manuals, directives, policy statements  
6 with respect to this set of searches, here are the policy  
7 statements with respect to this set of searches, we believe  
8 that other discovery goes far beyond what you are entitled to  
9 at this point.

10 I can't decide a motion to dismiss, obviously, that  
11 hasn't even been briefed. But these are the issues that I see  
12 going forward. They raise questions in my mind as to what the  
13 timing of discovery should be, particularly in a case which the  
14 defendants acknowledge is going forward with respect to these  
15 plaintiffs, with respect to these searches, with respect to  
16 their Bivins claims, their arguments with respect to the  
17 alleged unconstitutional searches of these plaintiffs against  
18 people who will be identified defendants as well as the agency  
19 defendants.

20 Those are a couple of the observations just in terms  
21 of what the timing is for this. Let me try to respond to those  
22 concerns. First of all, I wasn't trying to hide the ball with  
23 respect to the documents and the declarations that we will be  
24 submitting with the motion to dismiss. I simply did not want  
25 to concede that a policy and practice was the end of the

1 inquiry --

2 THE COURT: I'm sorry?

3 MR. CARGO: -- that a policy and practice is not the  
4 end of the inquiry under Lyons, because I don't think the case  
5 reads that way.

6 However, as the Court is aware, on a jurisdictional  
7 motion we can submit other evidence without converting it to a  
8 motion for summary judgment. We intend to submit declarations  
9 that say there is a policy and practice -- the practice is to  
10 not violate the Fourth Amendment, the policy is to be careful  
11 not to violate the Fourth Amendment -- and that these officers  
12 followed that policy. I agree with you, that is important to  
13 the issue of standing.

14 Now, if the Court desires some extra discovery with  
15 respect to that, I've seen cases where a district court has  
16 permitted limited discovery for the purpose of adjudicating a  
17 motion to dismiss for lack of standing, and the government  
18 would probably not object to that.

19 I can tell you that what we will try to do is put in  
20 declarations from people in supervisory positions at ICE that  
21 say there is a policy that these searches are on consent and  
22 that the officers are instructed to follow those policies.

23 THE COURT: Doesn't that suggest that there would have  
24 to be some production of a policy statement's directives that  
25 are given to the officers when they conduct the search as well

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1 as any policy statements that applied on a more general basis  
2 to this group of searches, not just we tell our officers not to  
3 violate the Fourth Amendment? Doesn't it provoke discovery  
4 with respect to what were the general guidelines and standards  
5 for this particular group of searches that went on at the two  
6 times that are identified in the amended complaint?

7 MR. CARGO: That may well be the case. It is a little  
8 bit difficult to answer that question in the abstract. Again,  
9 we plan to submit declarations and, where appropriate, sections  
10 of the policies and procedures that describe that they are  
11 supposed to conduct these home searches on consent.

12 THE COURT: Ms. Wolstein told me, I thought, last time  
13 that there were two separate groups of searches at issue. The  
14 first group was explicitly searches conducted where there was  
15 an effort to obtain consent. So it was a group of searches  
16 that had some standards out there that the officer attempted to  
17 get consent.

18 The second group of searches were, I think Ms.  
19 Wolstein told me, alleged gang-related searches which were  
20 conducted pursuant to administrative arrest warrants, a  
21 different group of standards or operating procedures that would  
22 have governed the two sets. One would have thought that there  
23 would be sort of general operating procedures with respect to  
24 the two separate searches.

25 MR. CARGO: I don't know the answer to that, to be

7amraguo

1 quite honest. One problem is we don't have authority to  
2 represent the individual defendants yet, so we are precluded  
3 from having conversations with them.

4 We understand the broad outlines of the program. We  
5 know more about the first program that your Honor mentioned  
6 than the second, but we'll certainly be investigating that  
7 after we have authority to represent the individual defendants,  
8 some of which were recently named in the amended complaint.  
9 It's new defendants. So we simply haven't had time to really  
10 consider that.

11 Moving to some of the substantive aspects of the  
12 motion itself, I think there are several problems with  
13 permitting discovery at this point. First, the discovery  
14 motion is premature, as your Honor indicated, because the  
15 plaintiffs have not yet moved for a preliminary injunction.  
16 And all of the cases that the plaintiffs rely on, including the  
17 Elsworth case from the district court in the District of  
18 Columbia, involve discovery sought in preparation for a  
19 preliminary injunction hearing, not a preliminary injunction  
20 motion itself.

21 The IOSH case is sort of in a different category,  
22 because in that case the plaintiffs were seeking discovery from  
23 nonparty banks. They sought an ex parte motion. Presumably  
24 the defendants didn't oppose that. And the plaintiffs did not  
25 make a preliminary injunction motion in that case.

1           That distinction, I submit, matters here because the  
2 government cannot divine what relief the plaintiffs will be  
3 seeking in their preliminary injunction motion. As I  
4 mentioned, in the amended the complaint the plaintiffs pray for  
5 two forms of equitable relief: A declaration that the  
6 defendants had violated their constitutional rights and an  
7 order estopping them from engaging in unlawful conduct in the  
8 future.

9           But in the TRO papers they sought a much broader  
10 order, one that, in the words of this Court, would require that  
11 the authorities forgo what is otherwise a constitutional search  
12 based on consent. In a recent decision from the district  
13 court, one that post-dates the Elsworth case in the District of  
14 Columbia, the court denied a motion for expedited discovery as  
15 overbroad because the plaintiffs were trying to radically  
16 transform the status quo, which is what plaintiffs may be  
17 trying to do in this case. As we say, without having a  
18 preliminary injunction motion itself it's difficult to tell  
19 what ultimate relief the plaintiffs are actually asking for.

20           The second point is the plaintiffs have not  
21 demonstrated here that they will be irreparably harmed by  
22 having to make their discovery motion in the ordinary course.  
23 They have not alleged that any evidence will be lost or  
24 destroyed. They haven't alleged that any of the testimony they  
25 seek will become unavailable.

1 Most importantly, the only exigent circumstance in  
2 this case that they have identified is the alleged irreparable  
3 harm of ICE returning to the homes of the plaintiffs. Ms.  
4 Gordon has said that the constitutional deprivations are  
5 occurring every day. Mr. Gennardo made many of the same  
6 arguments that we heard at the TRO hearing. But this Court has  
7 already determined that "there is no reasonable showing of  
8 immediate and irreparable injury to these plaintiffs."

9 In their papers the plaintiffs repeatedly state that  
10 they face irreparable harm notwithstanding this Court's finding  
11 to the contrary. So the Court should not permit plaintiffs to  
12 circumvent that finding and indeed circumvent the normal  
13 discovery process in this case.

14 Unless the Court has any questions about these points,  
15 Ms. Wolstein is prepared to talk about the scope of some of the  
16 requests themselves.

17 THE COURT: What about my implied suggestion, or maybe  
18 it's more appropriately directed to Ms. Wolstein, about  
19 producing discovery with respect to any policies, customs, or  
20 practices that apply to the searches at issue in the complaint?

21 MR. CARGO: In connection with a motion for standing  
22 or for lack of standing or in connection with a motion for  
23 expedited discovery to support a future motion for preliminary  
24 injunction?

25 THE COURT: All of the above plus the fact that all of



1 that discovery would eventually be discoverable with respect to  
2 these plaintiffs, these searches, these defendants. And the  
3 only thing that we are talking about is providing the Court and  
4 the other parties with the information that goes to the issues  
5 that we are talking about: The motion to dismiss, eventually a  
6 class action motion.

7 MR. CARGO: I think we should confer on that. I'm not  
8 trying to be difficult. Again, the policy says --

9 THE COURT: You're not being difficult. All I would  
10 have to do is to set a shorter time for the response to the  
11 motion for expedited discovery.

12 MR. CARGO: The big picture is I think some of that  
13 information is relevant to the issue of standing, but the  
14 documents and the categories of information they seek in their  
15 discovery goes far beyond the scope of the narrow issue of  
16 standing. Again, Ms. Wolstein can discuss the scope of those  
17 document requests, but they are extremely broad.

18 THE COURT: Not the one that I suggested.

19 MR. CARGO: No. Conceivably that's just a handbook  
20 that sets forth --

21 THE COURT: I would imagine it's more than a handbook.  
22 If in fact the searches were part of a program, part of an  
23 initiative, part of a however it is described, task force, one  
24 would think that there would be guidelines, policies,  
25 procedures that would go beyond a regular manual.



1 MR. CARGO: Yes.

2 THE COURT: Which would be identifiable and not  
3 burdensome. But perhaps Ms. Wolstein will deal with that.

4 MR. CARGO: The answer is I think it depends. If they  
5 are under a standing obligation not to violate the Fourth  
6 Amendment and that's articulated in some handbook, then I query  
7 why the addition of more specific protocols would have to  
8 reassert that.

9 THE COURT: Oh, please. You can have more than one  
10 set of instructions. You can have more than one set of  
11 manuals. You can have more specific instructions. And maybe  
12 those exist and maybe they don't. The details with respect to  
13 what the operating procedures were with respect to the specific  
14 searches at issue are matters that will be subject to discovery  
15 in the course of the case, one would think.

16 MR. CARGO: Yes.

17 THE COURT: I always caution that I use argument as an  
18 effort to obtain what the parties' positions are. I don't  
19 decide anything until I have actually decided it on the facts  
20 and the law. But I do attempt to understand what the parties'  
21 positions are.

22 MR. CARGO: It's the very early days of this case, and  
23 I can tell you that the government doesn't have anything to  
24 hide with respect to its policies and procedures. Now, I don't  
25 have how much information is out there. That's why I'm having

1 a difficult time answering your questions in the hypothetical.

2 THE COURT: The request for expedited discovery was  
3 out there even though it wasn't articulated in the original  
4 papers. There were several categories of documents that were  
5 referred to in the memo even though the plaintiffs had not  
6 gotten around to drafting document requests, interrogatories,  
7 and 30(b)(6) deposition requests.

8 And there was a discussion with respect to this issue  
9 at the last conference. At that conference you said it would  
10 take more than a couple of days because your client didn't work  
11 on the weekend. Now we're several weeks down the road and  
12 presumably, particularly because you're in the process of  
13 working with the client on the motion to dismiss, which will  
14 have to go into what the circumstances of these searches were,  
15 presumably there is some inquiry into what the policies and  
16 practices were that govern these searches and it goes beyond  
17 simply to instructions to people that they are to comply with  
18 the Fourth Amendment. True?

19 MR. CARGO: That's true. Again, you're talking about  
20 an enormous agency here, and we are just starting to pull all  
21 this information together. Keep in mind that we didn't receive  
22 the motion for expedited discovery until last week and had no  
23 reason to believe that that was on the horizon. So we are  
24 doing everything as quickly as we can, but we do not understand  
25 the universe of documents.

1 THE COURT: Come again?

2 MR. CARGO: I say we don't yet fully understand the  
3 universe of documents out there.

4 THE COURT: OK. Ms. Wolstein.

5 MS. WOLSTEIN: Your Honor, it would be one thing if  
6 the plaintiffs had made a proper, narrowly tailored motion for  
7 policies and practices. I think we recognize that that is at  
8 least relevant to the injunctive claim, although without a  
9 motion for a preliminary injunction we are somewhat hampered in  
10 knowing exactly what injunctive relief they are seeking.

11 The fact is the Court is doing the plaintiffs a great  
12 service in pointing out that what is really relevant and the  
13 discovery that is arguably relevant is the policies and  
14 practices. But that's not what they sought. They made  
15 enormously wide-ranging, comprehensive requests. I think it is  
16 important for the Court to see what those requests are, but  
17 I'll defer that to pick up on what is obviously the Court's  
18 interest in the policies and practices.

19 We can agree to confer among ourselves and to confer  
20 with our client to see whether there is some narrow universe of  
21 written documents that would speak to policies that are at  
22 issue here, again subject to any privilege that might apply. I  
23 know from experience in other cases that often policy manuals  
24 are produced with redactions for law enforcement privilege, and  
25 I would imagine that that might be the case here. So if that

1 would assist the Court, we could agree to confer about that.

2 Again, the plaintiffs have not merely sought policies  
3 and practices. They have submitted requests that go to every  
4 aspect of their requests for relief, both claims, the  
5 injunctive claim, the Bivins claim, some requests that are not  
6 relevant to either claim.

7 I would direct the Court that document requests number  
8 11 through 14 are all addressed to enforcement activities  
9 undertaken in the past. Numbers 12 and 13 seek comprehensive  
10 information about eight of the nine home searches alleged in  
11 the complaint, including the names of ICE officers present  
12 during the raids, the names of aliens sought at each location,  
13 the documents agents relied on in selecting the location for a  
14 search, the reasons for entering each residence, how the  
15 officers identifies themselves, and the name of everyone  
16 arrested.

17 This information certainly may bear on the Bivins  
18 claims and would help the plaintiffs identify the John Doe  
19 defendants, but really has nothing to do with their --

20 THE COURT: Don't you have an obligation to identify  
21 the John Doe defendants in any event?

22 MS. WOLSTEIN: Maybe, but not in a request for  
23 expedited discovery.

24 THE COURT: I know that.

25 MS. WOLSTEIN: I don't even know. If we are asked, we

1 may have an obligation, I would agree with that.

2 Request number 14 actually seeks comprehensive  
3 documents relating to home searches that occurred during  
4 certain weeks in February, March, and September that are not  
5 even at issue in the case.

6 Number 11 astonishingly seeks all summary enforcement  
7 activity reports generated by any ICE office. It's not limited  
8 to the enforcement activities at issue in the case, it's not  
9 limited by date, it's not limited to the conduct of the New  
10 York office, it's not limited to the New York operations at  
11 issue.

12 So these are requests that are vastly overbroad and  
13 would certainly be objectionable on the grounds of overbreadth  
14 in the course of normal discovery.

15 I could go on. Requests 9 and 10 are similar.  
16 Request number 7 asks for an OIG report that plaintiffs have in  
17 their possession and attached to their amended complaint.

18 THE COURT: Is a list of fugitive alien leads,  
19 including hot leads, a matter that is discoverable?

20 MS. WOLSTEIN: I would find it hard to imagine that  
21 that is subject to discovery but rather would be privileged  
22 under the law enforcement privilege. To give up a list of your  
23 targets and your leads would be quite an interference with  
24 enforcement operations.

25 Even the requests for policies, even those requests

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1 ask for policies and guidelines that cover the entirety of  
2 ICE's enforcement efforts, if you look at request number 1, not  
3 just the home searches. Request number 2 calls for policies,  
4 including policies that are not even in effect.

5 The interrogatories, as the Court pointed out, three  
6 of them on their face fail to comply with Local Rule 33.3. Of  
7 the remaining six, four of them go against the Bivins claims,  
8 the names of the officers who participated in the past.

9 The remaining two, I guess numbers 3 and 4, go to the  
10 policies. But again, as Mr. Cargo pointed out, the policies  
11 alone are not enough under Lyons to show what they need to show  
12 to obtain preliminary relief. They have to show that they are  
13 likely to be subject to future unconstitutional conduct also.

14 THE COURT: But they say in response to that that they  
15 are, some of them, currently undergoing the effects of the  
16 alleged unconstitutional search because they are undocumented  
17 aliens who have been identified in the course of the search.

18 MS. WOLSTEIN: That is not an ongoing constitutional  
19 violation. There is no right to not be put in proceedings when  
20 ICE believes there is a basis to believe you are an alien.  
21 That's not an ongoing constitutional effect. It's an ongoing  
22 effect; it's in no way unconstitutional. In that way the case  
23 is quite different from Deshawn, as the Court has previously  
24 recognized.

25 I just would point out on the depositions, there were

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1 four deposition notices attached. The 30(b)(6) notice is  
2 improper on its face in failing to specify the topics for the  
3 deposition, much less doing so with reasonable particularity,  
4 as the rule requires.

5 Then there are deposition notices as to the three  
6 Bivins defendants which presumably, if they served a proper  
7 30(b)(6) notice, they would ask for someone who could speak to  
8 the policies and practices. In that case the Bivins  
9 defendants' depositions would be entirely cumulative, as the  
10 only arguably relevant things to be covered would be the  
11 policies and practices.

12 I go through all this because the vast overbreadth of  
13 these requests really shows that the requests for expedited  
14 discovery is not a good-faith attempt to obtain a narrow field  
15 of information to support a contemplated unspecified  
16 preliminary injunction motion but is an effort to obtain early  
17 discovery, which of course every plaintiff would like to do, in  
18 the face of two realities.

19 One is the fact that they have no irreparable harm, as  
20 the Court has concluded, and they cannot show any irreparable  
21 harm, which is why they haven't sought a preliminary  
22 injunction. The second reality is that the government's motion  
23 to dismiss, if it were successful, would do away with the need  
24 for any discovery on the injunction claim because it would  
25 knock out that claim.



1 THE COURT: The discovery would be quite similar with  
2 respect to these plaintiffs on the Bivins claims.

3 MS. WOLSTEIN: Yes, some of the discovery would. But  
4 they can get their Bivins discovery in the course --

5 THE COURT: It wouldn't knock out the need for all of  
6 this discovery. It may defer the discovery. And  
7 realistically, the way in which people deal, as you all know,  
8 with document requests and interrogatories is people sit down  
9 and negotiate the scope. Sometimes they file objections first,  
10 then they negotiate the scope, and only after they have  
11 finished their negotiations, if they are unsuccessful, do they  
12 come to the court.

13 So it is plainly right that simply filing all of these  
14 discovery requests is not the end of the road. It's the  
15 beginning of the road as to what discovery should be allowed  
16 and when it should be allowed.

17 MS. WOLSTEIN: Understood, your Honor. I think  
18 perhaps if we had been faced with a request, even an oral  
19 request, saying listen, this is what we need, we need the  
20 policies, it might have unfolded quite differently. But  
21 instead we are hit with an incredibly wide-ranging request on  
22 an order to show cause.

23 THE COURT: But you haven't responded to the order to  
24 show cause yet. I've put over the response. I said I try and  
25 call the parties in and set the schedule. Sometimes an order



1 to show cause is able to be resolved by calling the parties in  
2 and it saves the parties time, effort, expense.

3 One way of resolving the order to show cause for  
4 expedited discovery, which may not be satisfactory to either  
5 side, is the government would agree to provide any policies,  
6 practices, procedures, guidelines that apply to the searches at  
7 issue in the complaint by a reasonably soon deadline. The  
8 parties can negotiate out what the precise terms of those  
9 documents would be, presumably in good faith.

10 If it resolves the whole motion for expedited  
11 discovery, the order to show cause for expedited discovery,  
12 that's fine, and discovery will proceed in the normal course  
13 because there is no motion to dismiss and won't be a motion to  
14 dismiss, at the very least, the individual claims by these  
15 plaintiffs, the Bivins claims with respect to the allegations  
16 that the searches against them were unconstitutional, and  
17 leaves open the fact that the defendants intend to make a  
18 partial motion to dismiss with respect to equitable relief. If  
19 the plaintiffs want to press requests for further discovery,  
20 they can ask for further discovery, and they can do that in due  
21 course.

22 As I say, I don't know if that is agreeable to either  
23 side.

24 MS. WOLSTEIN: I think we'd need to confer about it,  
25 and we could do so in short order. So if we could have a short

1 time to confer, including with the client.

2 One of the issues with requests like this is that the  
3 privilege review is not de minimis. I think there are a couple  
4 of layers within the agency of review. I don't know the  
5 precise scope, but I know it is not de minimis. It is not just  
6 us reviewing those documents for privilege. Often the way  
7 these agencies work is that they send to it the people that  
8 review FOIA requests, FOIA requests for production.

9 THE COURT: Has there been any FOIA request here?  
10 Yes?

11 MR. GENNARDO: Yes, there is, your Honor. We made  
12 FOIA requests way back when to obtain whatever warrants were  
13 used when approaching the Aguilar-Leon home. We did that back  
14 in July. We have gotten nothing but the run-around on that  
15 FOIA request for the last three and a half, four months. So we  
16 have not viewed FOIA as a particularly effective way of getting  
17 information in this case out of the government. It gets sent  
18 from one group to another group to another group to another  
19 group.

20 THE COURT: The Aguilar search was in the first series  
21 of searches?

22 MR. GENNARDO: Yes.

23 THE COURT: There was no warrant for them on the first  
24 series of searches?

25 MR. MAER: That's correct. Let me finish that and

1 address that, because that has to do with what the U.S.  
2 attorney has represented. It's truly a catch-22. We got a  
3 response back to the FOIA request saying we needed permission  
4 from the presumed target of this raid, which we don't know for  
5 sure but we think it is the ex-husband of our client. Now, we  
6 can't get that permission from him. Yet that's the only way we  
7 can get the warrant that was used to raid our client's home.

8 THE COURT: I thought with respect to the first set of  
9 searches --

10 MR. MAER: That's the second thing that has not been  
11 correct. No. They have to get consent for every single one of  
12 these raids, every single one.

13 THE COURT: I know that.

14 MR. MAER: Even the gang-related ones. The  
15 administrative warrant gives them no entry, no special  
16 privilege, to enter the home. So all of these raids have to be  
17 on consent. There's no two categories here.

18 THE COURT: I thought that the two sets of searches  
19 were according to two separate protocols, if you will.

20 MR. MAER: No. There is just one, as far as we know.

21 THE COURT: I thought that the second set was dealing  
22 with alleged gang-related enforcement activities.

23 MR. MAER: As far as we know, the administrative  
24 warrant, which is the only thing that ICE has to operate, is  
25 merely to arrest somebody. It doesn't have any address

1 attached to it, does not give them authority to enter a home.

2 We do have counsel, I believe she is chief counsel,  
3 for the U.S. Attorney's office and ICE here. She may be able  
4 to shed light on several of these matters, because we don't  
5 know for sure.

6 MS. WOLSTEIN: Your Honor, I did want to correct that.  
7 Evidently, I was not clear. I think our understanding at this  
8 point is that they are all consent searches, but there are two  
9 types of enforcement operations. One targets fugitive aliens,  
10 i.e., those under a final order of removal, and one targets  
11 gang members who may not be in proceedings yet.

12 THE COURT: OK.

13 MS. WOLSTEIN: The FOIA point, exemption 6 of FOIA is  
14 the personal privacy exemption. Without getting too far into  
15 it, but it does relate to one of your Honor's questions, of  
16 course the agency under FOIA exemption 6 is not permitted to  
17 release information that would intrude on personal privacy.  
18 It's a balancing test, the privacy interests versus the  
19 public's interests. That is certainly a legitimate response.  
20 If they don't like the response, they can bring a FOIA suit and  
21 the agency can argue exemption 6, that's why they were  
22 withheld.

23 As far as the Court's privacy question, I don't think,  
24 obviously, the FOIA exemption would apply here, exemption 6, as  
25 an authority to protect the privacy of the witnesses or the

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1 people arrested. The privacy act covers only citizens and  
2 lawful permanent residents. I cannot point to any particular  
3 authority that would require the government to withhold that  
4 kind of information.

5 I also want to add an important thing that I left out,  
6 which is that there are regulations known as Tuohy regulations,  
7 which I'm sure the Court has encountered. ICE and DHS have  
8 Tuohy regulations, which govern the responses to requests for  
9 information, including information sought in discovery in which  
10 the government is the party and that require authorization by a  
11 person with authority to permit the requested discovery. That  
12 is not something that I can waive, certainly not without  
13 consulting with the client.

14 We would be willing certainly to confer and consult  
15 with the client to see if that is something they are willing to  
16 do, to identify a narrow field of the policies and guidelines  
17 and procedures governing the searches at issue to see if there  
18 are portions that are not privileged that can be produced, but  
19 we would have to get back to the Court on that.

20 THE COURT: OK. Do the plaintiffs have any sort of  
21 response to my thoughts with respect to the requests at issue?

22 MR. GENNARDO: Yes, your Honor. We would welcome the  
23 opportunity to speak with the government. Certainly the  
24 policies and procedures are very important to us. Also, we  
25 would need to be able to depose some of the agents involved,

1 because of course the written policy and the actual in force  
2 active policy may differ. There may be directions given to  
3 agents in the field about how they should act that supplement  
4 what's in the policy. In fact, they may be told not to follow  
5 that policy but to follow a different policy.

6 We certainly would want to get information about how  
7 they actually acted in conducting the raids. But I think your  
8 Honor's suggestion is as eminently reasonable and practical and  
9 smart an approach to this, and we would certainly be willing to  
10 take that tack at this point.

11 THE COURT: There is an issue with respect to  
12 depositions prior to the motion to dismiss of the individual  
13 agents, some of whom are not even named and the government  
14 doesn't necessarily have authority to represent them. You want  
15 their depositions taken, and they are going to be defendants in  
16 the case.

17 They are not subject to the motion to dismiss. The  
18 government doesn't yet represent them, so they are  
19 unrepresented. You want this done quickly because it's going  
20 to relate to the motion to dismiss and the existence of  
21 policies or practices. It is not clear to me that that is  
22 something that can easily be done.

23 Also, it is useful to remember what standards the  
24 Court has to apply on a motion to dismiss. To the extent that  
25 there is discovery that's necessary, another way is to focus on

1 what's at issue on the motion to dismiss after a motion to  
2 dismiss is filed, presumably, as I'm told, supported by  
3 affidavits to see who the affiants are and determine whether  
4 there is discovery necessary from those.

5 Again, I don't decide anything until it is briefed on  
6 the facts and the law. There are practical problems in timing  
7 and questions of whether that is necessary for the decisions on  
8 the motion to dismiss or for any prospective application for  
9 preliminary injunction.

10 By making these suggestions, I don't mean to ask  
11 either side to compromise their position or give up what they  
12 think they are entitled to.

13 MR. GENNARDO: Thank you.

14 THE COURT: So you're going to get back to me on  
15 whether the parties have reached any agreement with respect to  
16 scope of immediate discovery and how you're going to accomplish  
17 that. If you don't reach an agreement, then I'll set a  
18 response time for the motion for expedited discovery. The  
19 government in any event is going to be making a motion to  
20 dismiss by November 16th.

21 MR. GENNARDO: Thank you, your Honor. Could I make  
22 one quick correction?

23 THE COURT: Sure.

24 MR. GENNARDO: It may be because of something I said  
25 last time. We haven't conceded here that any of our clients



1 are undocumented. They are being accused of being  
2 undocumented.

3 THE COURT: I think you made that point to me last  
4 time also.

5 MR. GENNARDO: I just wanted to be sure. Maybe I  
6 misunderstood something your Honor said a little earlier. I  
7 wanted to be sure we are operating under the same understanding  
8 there.

9 THE COURT: Accused of being undocumented. I  
10 understand that you haven't conceded that they are in fact  
11 undocumented.

12 MR. GENNARDO: Thank you, your Honor.

13 THE COURT: Anything else?

14 MS. WOLSTEIN: Could we have just a minute to confer,  
15 your Honor, as to whether there is anything else?

16 THE COURT: Sure. You can confer with each other,  
17 too.

18 MS. WOLSTEIN: Nothing further from us. Thank you,  
19 your Honor.

20 THE COURT: I'll wait to hear from you all.

21 (Adjourned)

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